



STATE OF NEW JERSEY

In the Matter of Jose Badilla, County
Correctional Police
Captain (PC2063U), Essex County

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

CSC Docket No. 2021-468

List Bypass Appeal

ISSUED: MAY 24, 2021 (SLK)

Jose Badillo, represented by Catherine M. Elston, Esq., appeals the bypass of his name on the County Correctional Police Captain (PC2063U), Essex County (County) eligible list.

By way of background, the appellant, a nonveteran, appeared on the PC2063U eligible list, which promulgated on August 24, 2017 and expires on August 23, 2021. The appellant's name was certified on July 8, 2020 (PL200636) for a position in the subject title. The first ranked candidate was appointed, the appellant, the second ranked candidate was bypassed, and the third-ranked candidate was appointed.

On appeal, the appellant requested all documentation to support the County's request to bypass him; all documentation between the County and the Civil Service Commission (Commission) regarding the appellant; all certifications on which the appellant's name was certified and returned to the Commission; any emails, memos, or other documentation to or from any County officials, Wardens, Officers or employees regarding Captain promotions in 2019, 2020 and 2021; any emails, memos, or other documentation to or from any County officials, Wardens, officers or employees regarding the appellant and promotions to Captain, and any and all written communications between Wardens Anderson and Cirillo, Captain Pires, Director Ortiz, Captain Folinus and County officials pertaining to the Captain promotions.

Additionally, the appellant asks for the reason he was bypassed for promotion; excluding his bypass, how often the County skipped candidates for promotion to the rank of Captain and when; in what way were the candidates promoted over the appellant more qualified than him; and why did Wardens Anderson and Cirillo tell him, on January 21, 2020, that he was being promoted.

In response, the County, represented by Jill Caffrey, Esq., states that under the “Rule of Three” and other regulatory and statutory authority, it had the authority to bypass the appellant for any legitimate business reason on the subject certification. In this case, it submits a certification from the Deputy Director at the time, William Anderson, who acknowledges that he previously told the appellant that he would be promoted. However, he indicates that he changed his mind shortly thereafter when he tasked the appellant, who was the shift commander at the time, with investigating an incident. However, Anderson indicates that he was dismayed by the quality of the appellant’s report in that he lacked report writing and investigative skills, including identifying and reporting important information. Therefore, Anderson concluded that the third ranked eligible, who was appointed, was better suited for the Captain’s promotion.

In reply, the appellant presents that the only proof that the County submitted was a certification from “Warden” Anderson. He notes that Anderson was not a “Warden” at the time of the bypass, but a “confidential aide.” The appellant states that there is no authority conferred upon a confidential aide to participate in the County’s Correctional promotional process. However, he indicates that in a separate proceeding regarding another officer, Anderson testified he was responsible for recommending promotions, but was not the final decision maker. Further, Director Ortiz testified that he was the decision-maker. The appellant emphasizes that the County’s sole response to this appeal was a single certification from Anderson, who is not the final decision-maker. Further, Anderson testified that he always provides Ortiz with a written recommendation; yet although demanded, that document has not be supplied on appeal nor has Anderson’s reversed recommendation provided to Ortiz been provided. Therefore, the appellant argues that either Anderson testified falsely or that the County has improperly withheld documents.

The appellant argues that the County’s proffered reason for his bypass is not credible as Anderson’s certification failed to include the actual investigative report relied upon and provides no specific details as to his issue with the report. He asserts that Anderson’s and Warden Cirillo’s promises over eight months to promote him makes Anderson’s claims even more incredible. The appellant states that Anderson admits that he told him that he was to be promoted, but does not specify when this occurred, and the County has not provided any documents even though Anderson testified that he “absolutely” would have made his recommendations in writing. He presents that the time periods that Anderson fails to provide for his recommendation for his promotion, his reversal of that decision, and the written documents verifying such dates are relevant as a promotional memo announcing his promotion to Captain

was issued by Anderson on January 23, 2020, two days after his promotional interview with Anderson, and then the memo was rescinded hours later. The appellant notes that the memo was not cited in Anderson's certification nor was it produced as demanded.

The appellant states that if Anderson is to be believed, then within a few hours of Anderson issuing the memo and telling him that he was promoted, Anderson would have obtained and evaluated his investigative report, obtained and reviewed Lieutenant L.'s investigative reports, compared their reports, which is something that he believes Anderson would have done prior to making his initial recommendation, completed a recommendation to Ortiz reversing his original recommendation, Ortiz would have reviewed the reversed recommendation, arrangements were made to rescind the announcement, and then the announcement would have been rescinded. The appellant argues this scenario is unlikely as to why Anderson started comparing reports after recommending to Ortiz that he should be promoted and then advising him of such. Specifically, the appellant presents that on January 21, 2020 at around 3:00 p.m., Anderson and Cirillo advised him that he was going to be promoted. They further advised him that he was being promoted instead of Lieutenant A. (Lt. A.) because they did not trust Lt. A. On January 23, 2020 at around 9:00 a.m., a promotional memo was issued announcing his promotion to Captain. However, hours later, it was pulled. On January 28, 2020, Lt. A. told the appellant after seeing the memo, he spoke to the Wardens regarding why he was bypassed, and he was told he was skipped for "bad-mouthing" the Wardens on social media and he told the Wardens that the social media thread they were relying on was fabricated.

The appellant believes that Anderson's certification is problematic in that he claimed he was "dismayed" by the "quality" of his reports; yet he failed to provide a copy of the report, failed to provide details of the investigation and/or the report including how the report failed to conform to County policy, and failed to provide any facts or specifics on how the lower ranked candidate was better suited for the rank of Captain. Thereafter, the appellant presents that on August 22, 2020, he was interviewed by Anderson and Cirillo for the promotion where they accused him of being in Ortiz's office the day before with the union making complaints. However, the appellant states that he was not at this meeting. Additionally, although his interview was 50 minutes long, neither Warden referenced how he conducted his investigation or his reports. Moreover, the appellant presents that he has been in numerous investigations and no one has questioned his investigations or reports. The appellant states that although he was not formally trained on report writing, he explains in detail how he learned how to write reports and how his reports have been reviewed by attorneys and how this appeal is the first time he learned that there were issues with his reports. He also notes that he was not bypassed for prior promotions.

In further response, the appointing authority reiterates its reason for the bypass, highlights that it had the discretion to bypass the appellant under the rule of

three and asserts that appellant has not met his burden to prove that its actions were unlawful.

In further reply, the appellant states that the County fails to provide, or even address, the documents that have been requested. Specifically, the appellant highlights that Anderson's written recommendation to promote him and his written recommendation to reverse that recommendation, both of which would provide the reasons for those actions, were not provided. The appellant argues that the County is concealing evidence which is relevant to the County's credibility. Additionally, the appellant presents that the County refuses to provide the investigation report in question, which he claims prevents him from defending the allegation that his report was deficient and asserts that without such evidence, the County lacks evidentiary support for its proffered reason for the bypass. Moreover, the appellant states that the County failed to provide a certification from Ortiz, who is the actual decision-maker and otherwise failed to address any of his arguments. Also, the appellant believes that the County lied, as at the time he wrote his investigative reports, he was not a shift commander as the County alleges and it has provided no evidence proving otherwise. The appellant reiterates his arguments and contends that the evidence establishes that the County exercised bad faith and retaliatory motive based on the Warden's mistaken belief that he attended a union meeting with the administration the day before his second interview.

CONCLUSION

N.J.S.A. 11A:4-8, *N.J.S.A.* 11A:5-7 and *N.J.A.C.* 4A:4-4.8(a)3i allow an appointing authority to select any of the top three interested eligibles on an open competitive list provided no veteran heads the list. Additionally, *N.J.A.C.* 4A:2-1.4(c) provides that the appellant has the burden of proof to show by a preponderance of the evidence that an appointing authority's decision to bypass the appellant from an eligible list was improper.

N.J.A.C. 4A:4-4.7(b)1 provides that an appointing authority that requests removal of an eligible's name from a list shall submit to an appropriate representative of the Commission, no later than the date for disposition of the certification, all documents and argument upon which it bases its request. Upon request of the eligible or upon the eligible's appeal, the appointing authority shall provide the eligible with copies of all materials sent to the appropriate Commission representative.

Initially, the appellant requests various documents related to the subject bypass as well as other documentation related to other bypasses by the County. However, as the County's stated reason for the bypass is that Anderson did not believe that the appellant's report writing was sufficient for a position as Captain, the Commission finds that Anderson's certification complies with *N.J.A.C.* 4A:4-4.7(b)1. There is no requirement under Civil Service law and rules for the County to

provide all documentation related to the subject bypass, including Anderson's written recommendations to Ortiz that the appellant should be promoted or bypassed, the appellant's investigatory report that is in question, or any information regarding other bypasses by the County.

In cases of this nature, where dual motives are asserted for an employer's actions, an analysis of the competing justifications to ascertain the actual reason underlying the action is warranted. See *Jamison v. Rockaway Township Board of Education*, 242 N.J. Super. 436 (App. Div. 1990). In *Jamison*, *supra* at 445, the Court outlined the burden of proof necessary to establish discriminatory and/or retaliatory motivation in employment matters. Specifically, the initial burden of proof in such a case rests on the complainant who must establish discrimination or retaliation by a preponderance of the evidence. Once a *prima facie* showing has been made, the burden of going forward, but not the burden of persuasion, shifts to the employer to articulate a legitimate non-discriminatory or non-retaliatory reason for the decision.

If the employer produces evidence to meet its burden, the complainant may still prevail if he or she shows that the proffered reasons are pretextual or that the improper reason more likely motivated the employer. Should the employee sustain this burden, he or she has established a presumption of discriminatory or retaliatory intent. The burden of proof then shifts to the employer to prove that the adverse action would have taken place regardless of the motive.

In the instant matter, it was within the County's discretion to select any of the top three interested eligibles for each appointment. Therefore, the first ranked candidate who was appointed, the appellant, the second ranked candidate who was bypassed, and the third-ranked candidate who was appointed, were reachable for appointment. Nevertheless, the appellant alleges that based on the County's incorrect belief about his union activity, that the County's stated reasons for the bypass are pretextual. Specifically, the County presents that it bypassed the appellant because he lacked the necessary investigatory and report writing skills to be a Captain. However, the appellant believes that the County's explanation is not credible as he was initially advised that he was going to be promoted, he had never been advised that there were issues with his investigation or report, and he alleges that during his August 22, 2020 interview, he was accused of complaining about "union stuff." Further, he asserts that he is more qualified than the appointed candidate, which he claims is not refuted.

In response to the appellant's allegations, the appointing authority submitted a certification from the Deputy Director at the time, William Anderson, who acknowledges that he previously told the appellant that he would be promoted. However, he indicates that he changed his mind shortly thereafter when he tasked the appellant, who was the shift commander at the time, with investigating an incident. Anderson states that he was dismayed by the quality of the appellant's

report in that he lacked report writing and investigative skills, including identifying and reporting important information. Therefore, Anderson concluded that the third ranked eligible, who was appointed, was better suited for the Captain's promotion.

Concerning the appellant's contention that Anderson did not have the "authority" to make the final decision regarding the appellant's bypass, it was within the appointing authority's discretion to afford Anderson's opinion whatever weight it determined appropriate in making its decision to bypass him so long as that decision was not based on invidious or unlawful motivation, which, aside from the appellant's unsubstantiated allegations, is not evident in the record.

Regarding the appellant's argument that the County's proffered reason for his bypass is not credible, the appellant indicates that Anderson and Cirillo initially advised him that he was going to be promoted by bypassing the first ranked candidate because they did not trust the first ranked candidate. Shortly thereafter, a promotional memo was issued announcing his promotion to Captain. However, hours later, it was pulled. Further, a few days later the first ranked candidate indicated to the appellant that he spoke to Anderson and Cirillo about their alleged concerns about his trustworthiness. Subsequently, approximately eight months later, on August 22, 2020, the appellant indicates that he was interviewed for a position in the subject title, where he was not questioned about his investigation or report writing skills. Additionally, approximately 10 months from when the appellant was initially advised that he was going to be promoted, October 8, 2020, the County returned the certification indicating that the first ranked candidate was going to be appointed and not the appellant.¹ In other words, based on the appellant's own argument, the County never indicated to him that he was going to be appointed to Captain based on his ability. Instead, he was allegedly only going to be appointed based on the concerns that the first ranked candidate was untrustworthy. Thereafter, apparently the concerns about the first ranked candidate were resolved because that candidate was appointed. Therefore, there is no evidence in the record that the County's initial representation that the appellant was going to be appointed was based on his skills and abilities. Further, the County's proffered reason, that the appellant's investigatory writing skills were insufficient for a position as a Captain, is a legitimate business reason.

Moreover, the appellant alleges that the County did not appoint him because it mistakenly believed he attended a meeting the day before his August 22, 2020 interview where he complained about "union stuff." However, it is not credible that the County would not promote him based on his alleged union activity based on a

¹ The record also indicates that the third-ranked eligible was not initially indicated as being appointed on the subject certification. However, there is documentation in the record that the appointing authority referred to the third-ranked candidate as a Captain prior to it returning the certification in its assignments and the certification was subsequently corrected to indicated that the appellant was bypassed, and the third-ranked candidate was appointed effective August 22, 2020.

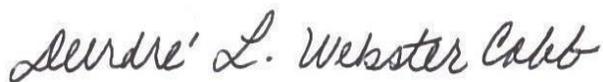
meeting he never attended with Ortiz as his attendance, or lack thereof, was easily verifiable by Ortiz. Further, the record indicates that almost immediately after the County advised him that he was being promoted, it pulled the promotional announcement, and there is nothing in the record that indicates that the appellant was bypassed for being involved in union activity during that short window. In other words, there is no evidence in the record, other than mere speculation, that the County's decision to bypass him was based on invidious or unlawful motivation. See *In the Matter of Chirag Patel* (CSC, decided June 7, 2017). Additionally, even assuming, *arguendo*, that the appellant was more qualified than the appointed candidate, as he has not presented any evidence that his bypass was based on an unlawful motive, the County's actions were within its discretion under the "Rule of Three." See *In the Matter of Michael Cervino* (MSB, decided June 9, 2004).

ORDER

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 19TH DAY OF MAY, 2021



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